



REPUBLIC OF KENYA



KENYA LAW
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**Adipo v Self Help Africa (Cause E019 of 2024)
[2025] KEELRC 1155 (KLR) (24 April 2025) (Judgment)**

Neutral citation: [2025] KEELRC 1155 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE E019 OF 2024**

JK GAKERI, J

APRIL 24, 2025

BETWEEN

LILIAN AWUOR ADIPO CLAIMANT

AND

SELF HELP AFRICA RESPONDENT

JUDGMENT

1. The claimant commenced the instant suit vide a Memorandum of Claim dated 22nd March, 2024 filed on even date.
2. The claimant's case against the respondent is that notwithstanding the loyalty, diligence and dedicated service, the respondent's Country Director terminated her employment vide letter dated 27th November, 2023 without giving reasons therefore, a move she questioned by her response dated 4th December, 2023.

The claimant prays for:

- i. A declaration that the respondent unprocedurally, unlawfully and unfairly terminated the claimant's employment.
- ii. 12 months compensation, Kshs.3,600,000 plus interest at court rates from date of Judgment till payment in full.
- iii. Costs of the suit plus interest at court rates from date of Judgment till payment in full.
- iv. Any other relief(s) this court may deem just and fit to grant.



Respondent's case

3. The respondent admits that it employed the claimant effective 6th July, 2023 subject to a 6 months probationary period, at Kshs.300,000.00 per month.
4. It is the respondent's case that the claimant's performance was wanting for the entire period of employment as she could not meet targets and struggled with project budgets and crucial project objectives, targets and reports, assistance notwithstanding.
5. That termination of the claimant's employment was lawful and all legal procedures were complied with as the provisions of Section 41 of the Employment Act were inapplicable and the procedures provided by the Employee Handbook were complied with.
6. The respondent avers that the claimant was paid all her dues under the employment contract and was not entitled to the reliefs sought. The respondent prays for dismissal of the claimant's case with costs.
7. On cross-examination, the claimant confirmed that she had worked for the respondent for 5 months and was terminated from employment while on probation and her suitability for the role was being checked.
8. The claimant testified she could not tell why her employment was terminated because under the respondent's Employee Handbook a Performance Review was necessary and the respondent could terminate her employment if she was adjudged as underperforming and was accorded one (1) months' notice of termination but the respondent did not conduct a performance review and the claimant had no performance challenges and had been inducted into his new role.
9. The claimant testified that the Performance Development Review was a tool by which an employee and the supervisor agreed on parameters to assess performance but it was not seen through.
10. The claimant admitted that vide email dated 3rd November, 2023 his supervisor, Mr. Peter Okech shared the PDR and the claimant forwarded the same later that month but it was not discussed by the two. In addition, Mr. Peter Okech forwarded another Managers PDR as a guide to enable the claimant prepare the PDR.
11. That the claimant's employment was terminated before she submitted the final PDR.
12. The claimant admitted that the supervisor was dissatisfied with the farm layout she had forwarded vide email dated 19th November, 2023 as she was managing the team and only Olive Wanjala responded to Mr. Peter Okech's 2 days deadline.
13. According to the claimant, a single outcome was insufficient to terminate her employment as the contract of employment had many deliverables.
14. On re-examination the claimant testified that under her employment contract performance was monitored on a regular basis and areas of improvement highlighted but was not monitored as the supervisor avoided the PDR and was terminated from employment as she worked on the PDR, having received a sample from the supervisor.

Respondent's evidence

15. RWI, Mr. Peter Okech confirmed that the claimant was employed under a written contract of service dated 6th July, 2023 and terminated from employment on 27th November, 2023.



16. The witness admitted that the letter of termination of the claimant's employment had no reason for termination. That the claimant was supposed to seek clarification, but did not ask for reasons in her response.
17. The witness, however, confirmed that no other document was given to the claimant and she was free to contact Mr. Ryan.
18. According to the witness the email from Jo Ryan dated 28th November, 2023 intimated that the claimant was aware of the termination of her employment.
19. RWI testified that meetings were held prior to termination of the claimant's employment but there was no documentation on what transpired.
20. The witness confirmed that the Employee Handbook applied to all employees and the procedure therein had to be complied with.
21. That meetings on performance were held weekly, on Tuesdays at 2:00pm and every month, but no minutes were filed or existed.
22. According to the witness the Performance Development Review the claimant was struggling to craft was a Performance Improvement Plan (P.I.P) yet no targets had been agreed upon or discussed as P.I.Ps are a joint venture between the employee and the supervisor. All deliverables and timelines are agreed upon. Mr. Peter Okech testified that the respondent had a standardized procedure of preparing PDR.
23. RWI testified that the claimant took one (1) month to prepare the PDR objectives and the Country Team Management Review meetings had no recorded minutes.
24. The witness further testified that he had attached evidence of the claimant's underperformance but had no minutes of any meeting.
25. The witness admitted that although he anticipated a review after the claimant's probation, her employment was terminated before it was undertaken and before the probationary period ended.
26. According to RWI, the claimant was underperforming but admitted that neither the termination letter nor any other document on record could confirm the same.
27. On re-examination, the witness testified that the respondent's procedure was that the letter of termination refers to other documents on the reasons for termination of employment.
28. RWI testified that he had a meeting with the claimant before termination of her employment and had suggested a course she could pursue to enhance performance, but the claimant allegedly declined. That the claimant refused to resign.
29. The witness reiterated that the claimant was aware of the termination of employment and the reasons thereof, the absence of minutes notwithstanding.

Claimant's submissions

30. On termination of the claimant's employment, the claimant's advocate submitted that it was procedurally flawed as the respondent did not issue a notice to show cause or invite the claimant for a hearing and no allegations were proved against the claimant.
31. Reliance was placed on the decision in *Postal Corporation of Kenya v Andrew K Tanui* [2019] eKLR, *Pius Machafu Insindu v Lavington Security Guards Ltd* [2017] eKLR, *Monica Munira Kibuchi v Mt. Kenya University & Another* [2021] eKLR, *Kemunto v Leo Investment Ltd t/a The Concord Hotels*



Ltd [2020], Omudeck v Ochwel Education & Relief Board [2022] KEELRC 1415 (KLR), Okoth v Jamu Telecommunication Ltd [2023] KEELRC [1643] KLR, Zeddy Cherono Sambu v National Oil Corporation of Kenya [2022] eKLR and Jane Samba Mukalla v Ol Tukai Lodge [2013] eKLR among others, on procedural fairness.

32. As regards substantive fairness, reliance was placed on the provisions of Section 43 of the *Employment Act* and the decisions in Lilian Muchungi v Green Belt Movement [2022] eKLR, Radar Ltd v Ali & Another [2023] KEELRC 1421 (KLR), Joseph Kiprotich Bett v Kenya Commercial Bank [2014] eKLR and Suri v Edulink International College Ltd [2022] KEELRC 1570 (KLR) among others, to submit that the respondent did not specify the reason(s) for which it terminated the claimant's employment and none was provided on request by the claimant, but sought to introduce poor performance during the hearing, to persuade the court to find that the respondent had a reason to terminate the claimant's employment.
33. Counsel urged that even if poor performance was the reason the respondent relied on, the principles outlined in Jane Samba Mukala v Ol Tukai Lodge (Supra) were not complied with.
34. Counsel submitted that termination of the claimant's employment failed the substantive fairness test.
35. On reliefs, counsel submitted that the claimant was entitled to all the reliefs prayed for, citing the decisions in Kenya Broadcasting Corporation v Geoffrey Wakio [2019] eKLR and Joseph Kiprotich Bett v Kenya Commercial Bank (Supra).

Respondent's submissions

36. As to whether termination of the claimant's employment was illegal and unprocedural, counsel for the respondent relied on the provisions of 42(1) of the *Employment Act* to urge that the claimant was serving under a probationary contract and failed to meet performance standards.
37. Reliance was placed on the decisions in Monica Munira Kibuchi & 6 Others v Mt. Kenya University (Supra), John Muthoni Mathiu v Mastermind Tobacco (K) Ltd [2018] eKLR, Danish Jalango & Another v Amicable Travel Services Ltd [2014] eKLR and Jelimo v Institute of Human Resource Management [2024] KEELRC 253 (KLR), among others, to submit that the provisions of Sections 43 and 45 of the *Employment Act* do not apply to probationary contracts as long as the termination of the employee is fair.
38. Reliance was placed on the Court of Appeal decision in CMC Aviation Ltd v Captain Mohammed Noor [2013] eKLR.
39. As to whether termination of the claimant's employment was illegal and unprocedural, counsel for the respondent relied on the sentiments of the court in Monica Munira Kibuchi & 6 Others v Mt. Kenya University [2021] eKLR, John Muthomi Mathiu v Mastermind Tobacco (k) Ltd [2018] eKLR and Danish Jalang'o & another v Amicabre Travel Services Ltd [2014] eKLR, to urge that the claimant had no case against the respondent as she was paid one (1) month notice, termination of her employment was fair and the employer retained the right to confirm her employment or not.
40. Reliance was also placed on the sentiments of the Court in Jelimo v Institute of Human Management [2024] KEELRC 253 (KLR), where the respondent was held not culpable for terminating a contract of employment during probation.
41. The decision of D.K. Njagi Marete J in Meru Multipurpose Co-operative Society Ltd v Jeremy Kiriimi [2022] eKLR was also cited to buttress the submission on termination of employment during probation.



42. As regards the reliefs sought, counsel submitted that since the termination of employment was lawful, no reliefs were available the claimant but urged that if the court was inclined to award compensation, it be guided by the provisions of Section 49(4) of the *Employment Act* and consider the Claimants conduct and in particular her underperformance which contributed to the termination of employment. Reliance was placed on CMC Aviation Ltd v Mohammed Noor [2015] eKLR.

Analysis and determination

43. It is common ground that the respondent employed the claimant as its Programme Manager for the Integrating Cassava into affordable and drought tolerant food systems (Kenya) Project under a written fixed term contract of service dated 6th March, 2023, effective 6th July, 2023 until 5th July, 2025 subject to a probationary period of 6 months.

44. The claimant's consolidated salary was Kshs.300,000 per month. It is equally not in contest that the claimant's employment was terminated vide letter dated 27th November, 2023 during the probationary period.

45. Under the Respondent's Employee Handbook, the respondent had a performance management framework and appraisal policy which provided that all employees on probation would be assessed by their supervisors and a Performance Assessment Report had to be submitted to the Human Resource/Administration Department one month prior to expiry of probation, with the supervisor's recommendation and the probationary period could be extended for 3 months if performance was considered unsatisfactory, if the supervisors recommended as such and if services were considered unsatisfactory thereafter, the employee's services would be terminated.

46. The Employee Handbook provided for an elaborate and detailed performance management system with clear timings, procedure and the specific obligations of the appraiser and appraisee.

47. For those on probation, assessment had to be held at the end of the probationary period and every employee had to be appraised irrespective of the duration served.

48. This background is essential in light of the evidence relied upon by the respondent.

I will revert to the issue shortly.

49. While the claimant contends that the termination of employment was unfair for non-compliance with the provisions of Section 41, 42, 43, 45 and 47(5) of the *Employment Act*, the respondent maintains that the separation was fair and procedural as the claimant was on probation and the mandatory provisions of Section 41 of the *Employment Act* were not applicable, and in any case the procedures outlined in the Employee Handbook were complied with.

50. It is trite law that for a termination of employment or dismissal from employment to pass muster, it must be proved that the employer had a valid and fair reason, relating to the employee's conduct, capacity or compatibility or operational requirements of the employer and the termination or dismissal was conducted in accordance with a fair procedure as ordained by the provisions of Section 45 of the *Employment Act* and embellished by other provisions cited by the parties.

51. Put in the alternative, there must have been a substantive justification for the termination of the employee's employment and procedural fairness as aptly captured by Ndolo J in *Walter Ogal Anuro v Teachers Service Commission* [2013] eKLR, thus:

“In light of the foregoing, I find that the respondent had a genuine reason for terminating the claimant's employment as required under Section 43 of the *Employment Act*. However, for



a termination to pass the fairness test, it must be shown that there was not only substantive justification for the termination but also procedural fairness...”

52. The Court of appeal expressed similar sentiments in *Naima Khamis v Oxford University Press (EA) Ltd* [2017] eKLR.
53. I will now proceed to examine whether termination of the claimant’s employment by the respondent was unfair.
54. Termination of employment during the probationary period has been considered in a catena of decisions such as, *Peris Nyambura Kimani v Dalbit Petroleum Ltd*, Petition No. 63 of 2013 where the court emphasized the mandatory nature of Section 42 of the *Employment Act*, *John Muthoni Mathiu v Mastermind Tobacco (K) Ltd* [2018], *Frank Zawadi Wanjala Mudibo & Others v Zircon Group Ltd* [2016] eKLR and *Titus Githinji Nderitu v Consolidated Bank of Kenya Ltd* [2022] Eklr, *Danish Jalang’o & Another v Amicabre Travel Services Ltd*, *Christopher Kisia Kirango v Amicabre Travel Services Ltd* [2014] eKLR among others, which upheld Section 42 of the *Employment Act*, that the provisions of Sections 41, 43, 45 and 47(5) of the Act do not apply to probationary contracts.
55. The other school of thought holds that Section 42 of the *Employment Act* is inconsistent with Article 41 of *the Constitution* of Kenya which guarantees employment and labour rights and is thus void.
56. In *Evans Kiage Onchwari v Hotel Ambassadeur Nairobi* [2016] eKLR, Ndolo J expressed the view that:

“I venture to add that Section 42(1) would also be unconstitutional. I say so because even assuming that an employee is found unsuitable within the probationary period, the rights secured under Article 41 must still be respected”.
57. Relatedly, in *Monica Munira Kibuchi & 6 Others v Mount Kenya University; Attorney General (Interested Party)* [2021] eKLR, a three Judge Bench of the Court declared Section 42(1) of the *Employment Act* null and void to the extent that it excluded an employee holding a probationary contract from the provisions of Section 41 of the *Employment Act*.

The Court expressed itself as follows:

“Further, in addition to the inconsistencies among Sections 42(1), 42(2) and 41 considered earlier in this Judgment, we find no reasonable and justifiable cause in the exclusion of an employee holding a probationary contract from the procedural safeguards contained in Section 41 of the *Employment Act*. To this extent therefore we find and hold that Section 42(1) in so far as it excludes an employee holding a probationary contract from the provisions of Section 41 of the *Employment Act*, is inconsistent with Articles 41 and 47 of *the Constitution* hence null and void”.
58. This court applied the foregoing decision in *Zeddy Cheronu Sambu v National Oil Corporation of Kenya* [2022] eKLR.
59. Arguably, since the facts of the instant case arose after the decision in *Monica Munira Kibuchi & 6 Others v Mt. Kenya University* (Supra), the decision is applicable and it is the finding of this court that the provisions of Section 41 of the *Employment Act* were applicable to this case contrary to the respondent’s averments.
60. However, it is essential to appreciate that the three Judge Bench did not interfere with the employer’s discretion to confirm or not confirm an employee serving on probationary terms.



Reasons for termination

61. It is common ground that claimant's letter of termination of employment had no specific reason for the termination. However, the respondent's witness Mr. Peter Okoth testified that the claimant did not request for the reason(s) her response dated 4th December, 2023 notwithstanding. Paragraph (a) of the claimant's catalogue of complaints queries the reason for the termination of employment. The claimant was indeed requesting the respondent to explain or state the complaint it had against her as a Programme Manager.
62. The respondent appear to have construed it differently though a plain reading of the paragraph leaves no doubt what its focus was.
63. Strangely, the respondent's witness indirectly introduced the claimant's performance as a possible reason for termination of her employment but could not substantiate the same for want of documentation. Although the witness severally testified that performance management was a continuous exercise and meetings were held weekly and monthly, including, Country Team Management (CTM) review meetings, the witness availed no documentary or other verifiable evidence to demonstrate that indeed meetings took place.
64. Similarly, the respondent's argument that the procedure in the Employee Handbook was complied with also lacked supportive evidence.
65. The Handbook was clear that all employees had to be appraised irrespective of the duration served, but RWI had no documented appraisal of the claimant prior to termination of her employment. He could not recall any specific meeting when he sat with the claimant to discuss her performance or brief her on how to prepare a Performance Development Review (PDR) having availed a sample.
66. However, the court is in agreement with the respondent's witness that the email from Jo Ryan to the claimant dated 28th November, 2023, which forwarded the letter of termination of employment appears to suggest that the claimant was indeed aware of the impending termination of employment.
67. Was the respondent required to set out the reason(s) for terminating the claimant's employment?
68. Guided by the sentiments of the three Judge Bench in the Munira Case, the court is satisfied that the respondent ought to have identified the reason(s) for which it was terminating the claimant's employment but failed to do so, which creates the impression that it had none as attempts to provide one at the hearing could not avail the respondent.
69. In the instant case, however, it is discernible that the claimant may have been aware of the reason(s) for termination, if the contents of the email from Jo Ryan are to be believed.

Procedure

70. In *Pius Machafu Isindu v Lavington Security Guards Ltd* [2017] eKLR, the Court of Appeal held that the elaborate procedure prescribed by Section 41 of the *Employment Act* was mandatory.
71. The procedural elements of Section 41 of the *Employment Act* have been addressed in various decisions including *Postal Corporation of Kenya v Andrew K. Tanui* [2019] eKLR, where the Court of Appeal summarised them as an explanation of the grounds of termination of employment in a language understood by the employee, reasons for which termination of employment is being considered, entitlement of the employee to the presence of a colleague of his or her choice when the explanation of the grounds of termination is made, and finally, hearing and considering the explanation by the employee and the person chosen by the employee.



The court stated:

“...A hearing not so conducted is irregular”.

72. In *Jane Samba Mukala v Ol Tukai Lodge (Supra)*, Mbaru J. held as follows:

“Where this procedure set out under Section 41 of the *Employment Act* is not followed, then a termination that arises from it will be procedurally irregular. This holding was similarly held in the case of *Avril Elizabeth Home for the Mentally Handicapped v Commission for Conciliation, Mediation & Arbitration & Others* [2006] 27 ILJ 1644(4) that when an employee is charged with poor performance, it must be clearly set out and differentiated between what is a misconduct and incapacity both conceptually and practically.”

73. In the instant case, the respondent availed no verifiable evidence to show that the claimant was under performing and had been informed of the same and the same had been discussed with the supervisor and the claimant afforded an opportunity to defend her performance and a decision made on whether to terminate her employment or be accorded an opportunity to improve. In the case of the former, the respondent ought to have invited the claimant for a hearing in the presence of a colleague chosen by the claimant and a formal hearing conducted.

74. In a nutshell, the respondent was enjoined to comply with the provisions of Section 41 of the *Employment Act* but did not, rendering the termination of the claimant’s employment procedurally flawed.

75. The foregoing is fortified by the provisions of Section 45(4) of the *Employment Act* that:

- (4) A termination of employment shall be unfair for the purposes of this Part where—
 - (a) the termination is for one of the reasons specified in section 46; or
 - (b) it is found out that in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employment of the employee.
- (5) In deciding whether it was just and equitable for an employer to terminate the employment of an employee, for the purposes of this section, a labour Officer, or the Employment and Labour Relations Court shall consider —
 - (a) the procedure adopted by the employer in reaching the decision to dismiss the employee, the communication of that decision to the employee and the handling of any appeal against the decision;
 - (b) the conduct and capability of the employee up to the date of termination;
 - (c) the extent to which the employer has complied with any statutory requirements connected with the termination, including the issuing of a certificate under section 51 and the procedural requirements set out in section 41;
 - (d) the previous practice of the employer in dealing with the type of circumstances which led to the termination; and
 - (e) the existence of any previous warning letters issued to the employee.

76. Having found that the respondent did not set out the reason(s) for which it terminated the claimant’s employment, did not comply with the procedural requirements under Section 41 of the *Employment*



Act and the claimant had no recorded warning letter, it is the finding of the court that termination of the claimant's employment by the respondent was unfair.

Reliefs

i. Declaration

Having found that the termination of the claimant's employment by the respondent was unfair, the declaration sought is merited.

ii. Compensation

Bearing in mind that the claimant was still on probation, had no previous warning or disciplinary matter anticipated to serve for the duration of the contract, did not appeal the respondent's decision and contributed to the termination as email exchanges on record reveal, and having further found that the claimant was an employee for about 4 months and three weeks only, which is very short, the court is satisfied that the equivalent of one (1) month's gross salary is fair, Kshs.300,000.00.

77. In the upshot Judgment is entered in favour of the claimant against the respondent as follows:

- a. Declaration that termination of the claimant's employment by the respondent was unfair.
- b. Equivalent of one (1) month's gross salary, Kshs.300,000.00.
- c. 50% of the costs of the suit.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 24TH DAY OF APRIL, 2025.

DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE

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